must almost surely turn on the extent to which the defense might succeed in bringing home to the jurors' minds that Albert Bracer was the victim of Solero's initial cowardly selfishness and the investigative ardour of the Federal Narcotics police.

It is against this background of the peculiar trial "strategy" setting which Bracer's trial attorney evidently felt his client's defense must reflect, that evaluation should be made of the constitutional import of what the Government here claims amounted to some kind of election on the part of the Bracer trial defense to bring to the Jury's attention the Bracer written statements.

We turn now to the chronology of the trial happenings which relate to the bringing of the Bracer written statements to the attention of the Jury; in the recitals which follow it will be noted that we include references to the search and seizure aspects of the case along with our references to the Bracer written statements, our reason for doing so being that (as will appear) Bracer's trial counsel was evidently trying, albeit not with invariable "strategic" surehandedness, to get across to the Court and the Jury the sense of overall injustice and constitutional oppressiveness in the way the Government had gone about making its investigative and prosecutive case against Bracer.

Chronologically, the first item in this (again, admittedly, less than "strategically" perfect) pattern of the Bracer trial defense was Mr. Segal's objection (on grounds of unlawful seizure), during the direct examination of the Government's first witness Narcotics Agent Bailey, to the introduction in evidence of or any reference to the small "user's" quantity of heroin which was swept from the

floor of Bracer's car on the night of his arrest, April 10, 1963 (Tr. 67).*

Next—and further relating to the testimony of Agent Bailey who, the Government correctly states (Br. in Opp. p. 5), did not testify on direct examination to any statements taken from Bracer after the search of his apartment later on the night of April 10—the herein relevant trial chronology proceeds with an item in the cross examination of Bailey at Tr. 202, with which Bracer's own trial attorney had nothing to do; under the order of cross examination of the Government's witnesses Bracer's attorney, Mr. Segal, cross examined last, Mr. Molofsky (for Torres) and Miss Perlmutter (for Solero) being first and second, respectively. The item at Tr. 202 just mentioned was in the cross examination of Bailey by Miss Perlmutter in which she was asking the witness about his knowledge of the second or recantation statement by Solero wherein Solero had said that he had given Bracer "a fix", and Miss Perlmutter was asking Bailey whether at the time of Solero's recantation statement he had known that Bracer was an addict, to which Bailey answered "I know that he said he was". Miss Perlmutter's questioning continued as follows (Tr. 202):

> "Q. You spent a night with the defendant Bracer, did you not? A. That's right.
>
> Q. You viewed his actions that night, did you not? A. Yes.

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* It will be recalled that the Bracer defense had moved before trial to suppress the evidence seized at Bracer's home later that night (Pet. Cert. p. 12); the item at Tr. 67 mentioned in the text above, which related to the earlier seizure of heroin that same night in Bracer's car, had not been included in the pretrial motion; later in the trial such inclusion was made more explicit and formal by the Bracer defense (*infra*).

> Q. I ask you again, did you know that the defendant Bracer was a dope addict? A. I know that he said he was."

Here, then, was the first testimonial indication to the Jury in this trial that agent Bailey had spent a considerable time with Bracer subsequent to the last happenings to which Bailey had testified in his direct examination in regard to Bracer, i.e., subsequent to the visit and search at Bracer's apartment on the night of April 10, 1963. With this item having been brought to the Jury's attention, not by Bracer's own attorney, it is fair to say that even if Bracer's attorney might otherwise have thought it best for his client to leave alone the topic of Bailey's having "spent a night" with Bracer after the search of the Bracer apartment, there would now be at least a strong prudent impulse on the part of the Bracer defense to go further into this topic when the Bracer cross examination of agent Bailey came around in due order.

The next item is also one which came into this trial record during Miss Perlmutter's cross examination of agent Bailey. At Tr. 213 Miss Perlmutter was asking Bailey about his effort to locate a man named Reeves or Reed whom Solero had named in his recantation statement as his actual source of supply, and in an unresponsive reply to one of these questions by Miss Perlmutter Bailey gratuitously brought in a reference to "meetings with * * * Al Bracer in an attempt to get information and develop that information. These relate to other narcotic violators" (Tr. 213). Here again, then, the Jury's interest was being stimulated (and, likewise, again, not by Bracer's own trial attorney) concerning apparent dealings between agent Bailey and Bracer to which Bailey had not testified in

direct examination and which must unmistakably have occurred subsequent to the visit at and search of Bracer's apartment on the night of April 10, 1963, which was the latest Bailey-Bracer item to which Bailey had testified on direct examination.

It was only after these items that the items now to be noted, in the cross examination of agent Bailey by Bracer's own attorney (Mr. Segal) came into the trial record:

At Tr. 292-295 Mr. Segal touched, for the first time, upon the period subsequent to the search of Bracer's apartment (the night of April 10, 1963), the questioning here being strictly confined to the question of whether later that night Bracer was showing narcotics "withdrawal" symptoms and whether the agents gave him any narcotics.

At Tr. 304 there occurred the following (in Mr. Segal's cross examination of agent Bailey) which we respectfully deem to be of decisive importance as affecting the issue which the Government has raised as to the "elective" strategy of the Bracer defense in having supposedly chosen to open up for the Jury the entire topic of the Bracer written statements. Mr. Segal (at Tr. 304) was asking Bailey whether *when he was talking to Bracer in the latter's automobile at the time of his arrest during the first-stage happenings on the night of April 10,* "did he tell you about Solero". Bailey gratuitously replied, "He did, eventually. I don't know if he admitted right away everything." When Mr. Segal then remonstrated with Bailey that this answer was not responsive, there followed a fencing colloquy between Bailey on one side and the Court and Mr. Segal on the other side, in which at one point Bailey said "The day of his arrest I had several conversations with him" (Tr.

304). This fencing by Bailey, with repeated combination of both hinting and evasive answers (i.e., hinting at other conversations with Bracer) continued from Tr. 304 to Tr. 306.

Then, at Tr. 308-321—whether with perfect "strategic" wisdom or not being a question which we can hardly believe will prove decisive, in this Court, of the grave constitutional issues involved—Mr. Segal questioned agent Bailey about the night-long peregrinations of the agents and Bracer on April 10-11, 1963 and the concurrent grilling of Bracer. It is evident from a reading of this testimony at Tr. 308-321 that Mr. Segal was, at least primarily, trying to elicit from Bailey whether during that night Bracer had been endeavoring to exculpate himself as a mere user of narcotics rather than as having been Solero's source of supply. And, as Mr. Segal also kept hammering away at Bailey on the topic of whether Bracer was showing narcotics "withdrawal" symptoms that night, Bailey suddenly delivered himself of another of his gratuitous revelations, which had not been remotely elicited or sought by the Bracer defense (Tr. 312):

> "Q. Did you speak to him at 3:30 or 4 o'clock in the morning at 90 Church Street? A. Yes, sir, I believe I did.
>
> Q. Were you able to get him to speak rationally? A. Yes, sir. *He gave me a statement.*
>
> Q. Did he speak rationally? A. *He gave me a statement.*
>
> Q. I beg your pardon? A. I said, yes, sir, he gave me a statement." (Emphasis added)

Thus it was *via* agent Bailey's gratuitous remarks above quoted that the Jury in this trial learned, for the first time,

of Bracer's having given a statement to the narcotics agents at 90 Church Street late in the night of April 10-11, 1963. It is true that Mr. Segal's immediately next following question to Bailey elicited the further fact that the statement was in typewritten question and answer form (Tr. 312-313), but it is manifest from a reading of this next portion of the Bailey testimony that, again, Mr. Segal was aiming at the fact of Bracer's having been physically and mentally incapacitated during the taking of this statement, and that he was in nowise "electing" (at that juncture) to bring out *anything about the contents* of that statement (Tr. 312-313)—indeed, as will appear, the only aspects in which Mr. Segal ever in this trial let himself go into the contents of either of the Bracer written statements (i.e., the one taken by the agents or the subsequent one taken by Assistant United States Attorney Gold) were in regard to the question of Bracer's mental and physical condition at the time, and in regard to whether Bracer had tried to exculpate himself on the point of who owned the heroin in his apartment (i.e., whether it was his or Solero's);* and

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* It is of interest also that there are facts persuasively pointing to Mr. Segal's himself having been, quite believably, under a factual uncertainty (at the time of his above described questioning of agent Bailey) as to whether Bracer had given the agents the typewritten statement which Bailey had gratuitously thrust before the Jury's attention. In the pretrial motion to suppress Bailey had said such a statement had been taken, although he had so testified in a somewhat unsure way (Tr. Mot. Supp., p. 22); but agent Kreppein, who is noted in writing as having been present with Bailey at the taking of the Bracer statement here referred to (Pet. Cert., Appendix C, p. A8), had testified in the motion to suppress proceeding that no such written statement had been taken from Bracer by the agents or signed by him, and even when pressed by the District Attorney and the Court Kreppein had no recollection of it (Tr. Mot. Supp. pp. 39-42). We mention these facts for their further indication

as to this last it is evident that what Mr. Segal was driving at was only that the large quantity of heroin found in Bracer's apartment was not of that "user's" scale of quantity which Bracer would have been likely to have around as his own property (Tr. 317). Indeed, so assiduously bent was Mr. Segal upon "staying away" from any plenary "election" to spread before the Jury unrestrictedly the full text of the Bracer written statements that he was obliged (at Tr. 317) to remonstrate with Bailey when the latter wanted to refer further to the written statement given to the agents.

This entire last-described question-and-answer exchange between Mr. Segal and Bailey concerning the Bracer written statement to the agents on the night of April 10-11—an exchange in which, as we have emphasized, Mr. Segal was trying so carefully to avoid the very "election" which the Government is now suggesting—took still another decisively significant turn at Tr. 319-321, when the Court itself took over the questioning of Bailey:

> "*By the Court*:
>
> * * * * *
>
> "Q. Mr. Segal questioned you about whether or not Bracer on the night of his arrest told you about Solero. That was what he asked you and you said

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that, in all fair likelihood, Mr. Segal's above described questioning of agent Bailey at the trial was not a consciously "elective" choice to "elicit" the fact of Bracer's having given a written statement to the agents, and that in all fair likelihood to the contrary the case is, as above suggested, that the first revelation to the Jury in this trial that any such written statement existed was the result of the over-eager testimonial "initiative" of agent Bailey.

he eventually did. Tell us what he eventually on that night told you about Solero? A. In the office of the Bureau of Narcotics during the taking of the statement of Bracer I believe, if I recall correctly, he described his relationship with Solero. I would have to see the statement.

Q. Is it true that whatever you were referring to as to what Bracer told you about Solero that night would be contained in the typewritten statement that you prepared? A. Yes, sir. He told me several stories about Solero. He changed his story when we started to take the statement after he agreed to cooperate. He at first had told me that he was addicted and he was holding the stuff for other people, and then when I described to him that I knew more than he thought I knew he admitted to the situation as it was and I—

The Court: Strike out 'he admitted to the situation as it was.'

Q. He told you certain additional statements? A. Yes.

Q. Is that contained in the typewritten statement? A. Yes, sir.

Q. That was also, of course, after his arrest? A. Yes, sir.

Q. That was when he was down in the Bureau of Narcotics' office around 3:30 or 4:30 in the morning? A. Yes, sir."

With the above questioning of Bailey by the Court, the "cat was out of the bag" with a vengeance as regards the Jury's awareness of Bracer's having made written statements. The "election", then, was that of the Government's principal witness (Bailey) and of the Trial Judge, not of Bracer or his trial attorney.

The above questioning of Bailey by the Trial Court came at the close of the trial session on May 12, 1964. In Mr. Segal's resumption of the cross examination of Bailey (Tr. 322, et seq.), Mr. Segal devoted considerable further time to the topic of the agents' and Mr. Gold's interrogation of Bracer during the early morning of April 11, 1963 (Tr. 322-346), but this further questioning of Bailey by Mr. Segal dealt exclusively with the subject of Bracer's mental and physical condition as occasioned by his narcotic "withdrawal" symptoms, plus the subject of the Government's overtures to Bracer to "cooperate"—which last will scarcely be taken as connoting a plenary "election" by the Bracer defense to open up without limit for the Jury's attention the contents of the written statements, in view of the obvious and legitimate interrelationship of the question of Bracer's physical and mental helplessness on one hand and his susceptibility to Government pressures for "cooperation" on the other hand.

The next item in the herein relevant trial chronology is at Tr. 360, et seq., where, in Mr. Segal's re-cross examination of agent Bailey he requested the Government to turn over to him the two Bracer written statements (Tr. 360-361); Mr. Segal then asked Bailey whether it was not a fact that the statement taken by the agents was one "that would overcome your failure to obtain a search warrant to go to his house", to which the Government objected that "the best evidence is the statement itself", and the Court sustained the objection (Tr. 361-362);* then, at Tr. 363-364

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* Note how the Government was here, step by step, laying the ground for the *coup* of ultimate reception in evidence of the two written Bracer statements.

the prosecutor had agent Bailey identify the first of the two Bracer written statements;* then, at Tr. 364, upon further re-cross examination of Bailey by Mr. Segal, Mr. Segal endeavored to show from the last page of the Bracer written statement taken by the agents that Bracer had been given a shot of heroin by the agents at 90 Church Street, Mr. Segal having made this endeavor by asking Bailey to read the relevant portion of the statement only to himself, but at Tr. 365 on the prosecutor's objection the Court blocked this effort, and in a colloquy at the Bench Mr. Segal then tried to convince the Court on this point but the Court adhered to its ruling on the grounds that the subject had been sufficiently covered, that it was becoming too protracted, and that Bracer had had enough opportunity previously to get the statement in (Tr. 365-367).**

The next item is that in the Government's direct examination of agent Kreppein it further advanced its own step by step "elective" strategy of getting the two Bracer written statements before the Jury, by having agent Kreppein identify the statement given by Bracer to the agents (Tr. 401).

In Mr. Segal's cross examination of Kreppein he questioned the witness about Bracer's "withdrawal" symptoms during the happenings of the night of April 10-11 after the agents and Bracer left the latter's apartment (Tr. 513-519); he also questioned Kreppein whether during that time Bracer had exculpated himself as to who owned the

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* We respectfully repeat our last preceding footnote.

** Note how here, once again, the Bracer defense was exerting every caution to avoid any inadvertent "election" to make plenary disclosure of the Bracer written statements before the Jury.

heroin seized in Bracer's apartment and Kreppein denied that Bracer had done so (Tr. 521-523).*

Again, at Tr. 523-531 Mr. Segal questioned agent Kreppein about Bracer's illness at 90 Church Street and details of the circumstances of his physical custody there.

At Tr. 531-536 Mr. Segal questioned agent Kreppein about the written statement which Mr. Gold had taken from Bracer, this questioning being directed exclusively to whether Bracer had had a dose of narcotics while in the custody of the agents that night and to his illness during that time; at Tr. 535 the prosecutor objected that Mr. Segal in this questioning of Kreppein was reading from an item not in evidence;** the Court allowed the questions for the purpose of eliciting whether agent Kreppein remembered that Bracer had been asked by Mr. Gold about his illness and about having been given a dose of narcotics.

At Tr. 537-541, where Mr. Segal was questioning Kreppein whether in the statement to Mr. Gold Bracer had claimed that he got narcotics from Solero for his own addictive use, the prosecutor objected again that the Gold statement was not in evidence (Tr. 538-539), whereupon the Court directed Mr. Segal to read from the Gold state-

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* We note that Kreppein's denial that Bracer had thus exculpated himself scarcely could add justification for any subsequent attempt by the Government to introduce in evidence the Bracer written statements—that is, since Kreppein denied that Bracer's written statements were exculpatory, how, conceivably, could the introduction of those statements be justified on any theory of "rebuttal"? Quite the contrary, the Government could (and did—see our description *infra* of the prosecutor's summation to the Jury) want those statements in evidence only because it deemed them inculpatory as to Bracer.

** This being one more gambit in the Government's now unmistakable "election" to get the Bracer written statements into evidence in this trial.

ment (which did support Mr. Segal's theme), and thereupon agent Kreppein denied that Bracer had made any similar claim in the prior statement that night which he had given to the agents (Tr. 539-541).*

In the item which we are now to mention—and which is chronologically the next relevant item in these recitals**—the Bracer trial defense "strategy" may have stumbled, but we do not think that this is significant in point of the issues of constitutional procedure here involved. At Tr. 590-601 the prosecutor announced a stipulation that the stenographer who had taken the Bracer statement to Mr. Gold would testify that she had transcribed it, and Mr. Segal, subject only to certain objections as to disputed items of deletion, did not object to the admission in evidence of this statement. At Tr. 602-603, relating to the admission in evidence of the Bracer statements to the agents, Mr. Segal began to recover himself and declared that "there may be objection on the theory that while not obtained under duress it was obtained under circumstances that may amount to physical duress." At Tr. 603-604 the Court told the Jury that it would later instruct them on the issue of voluntariness. At Tr. 604 Mr. Segal further recovered himself and

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* We here again note that, in view of this flat denial by agent Kreppein, there could scarcely be a justification, on any "rebuttal" ground, for the Government's subsequently introducing in evidence the text of Bracer's written statement to the agents. And in this connection it is revealing that, in the prosecutor's re-direct examination of agent Kreppein there was no reference to the Bracer statements such as might have been expected if the Government were following a bona fide trial strategy of "rebuttal", rather than a strategy of ambush to destroy the Bracer defense by introducing the Bracer written statements on Bracer's own "election."

** Throughout these recitals on the subject of the alleged election of the Bracer defense to spread the two Bracer written statements before the Jury, we are aiming at exhaustive factual presentation.

reuested the Court to submit to the Jury the question of voluntariness as to both statements (the one to the agents and the one to Mr. Gold).*

At Tr. 604 the prosecutor read to the Jury Bracer's written statement given to the agents, and at Tr. 605 he read the written statement given to Mr. Gold.

Tardily, but we trust not fatally so, Mr. Segal, after the Government had rested and in the course of his motions at that stage, objected to the reception in evidence of both the Bracer written statements on the ground of the "wholesale invasion of the defendant's rights under the circumstances" (Tr. 619-621, see Tr. 621).

As instancing the Government's strongly hopeful reliance upon the Bracer written statements to obtain a conviction against him in this notably weak case, the prosecutor at Tr. 623-624, in his argument that he had proved a prima facie case of conspiracy, cited to the Court Bracer's "statement * * * made at the time of his arrest"; it is manifest from the context of the Prosecutor's remarks at this place in the record that he was trying to reap advantage comprehensively from the entire pattern of Bracer's post-arrest statements, and not merely from the oral statements of Bracer in the automobile at the outset of the happenings of the night of the arrest.

At the conclusion of all of the proofs Mr. Segal, evidently having become progressively more mindful of the cumulation of unconstitutional impingements on his client, requested the Court to consider his constitutional contentions

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* Unfortunately, the Bracer defense did not, at this stage or later, invoke the more underlying principle of *Jackson* v. *Denno,* 378 U.S. 368 (see Pet. Cert. p. 16).

as including the search and seizure in Bracer's automobile at the outset of the arrest happenings (Tr. 786-796);* the Court entertained this request but denied it (Tr. 796).

In Mr. Segal's summation to the Jury he did, as the Government states in its Brief in Opposition, dwell upon the circumstances of Bracer's dealings and conversations with the agents on the night of his arrest following the visit and search at his apartment (Tr. 833-836, 840-841); and he did also plead to the Jury the issue of the voluntariness of Bracer's written statements (Tr. 833-836).** We nevertheless submit that, in the light of the above recited trial chronology and of the evidently dilemma-ridden anguish of the Bracer defense in its earnest efforts to keep working out a proper trial strategy under the extraordinary circumstances of this case with its initial frameup by Solero followed by the latter's recantations both before and at the trial, these oratorical exhortations by Mr. Segal in his summation to the Jury should not be given undue weight in this Court's evaluation of the constitutional issues presented.

Much more to the point is the issue of prejudice, both constitutional and atmospheric, presented by the prosecutor's remarks in his own summation to the Jury, in which

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* It will be recalled that at Tr. 67 Mr. Segal had first intimated a like contention and that this search-and-seizure phase had not been raised in the pretrial motion to suppress, which dealt only with the subsequent search at Bracer's home. We earnestly ask this Court to view with what we feel is a deserved constitutional sympathy and latitude this evolving awareness on the part of Bracer's trial counsel that his client was involved in an overall complex of really extraordinarily abusive unconstitutional procedures.

** I.e., instead of having invoked the rule of *United States* v. *Carignan*, 342 U.S. 36, *Smith* v. *United States*, 348 U.S. 147, 151; and *Jackson* v. *Denno*, 378 U.S. 368.

he made unstinting use of the Bracer written statements (as well as of Bracer's alleged oral admissions at the time of his arrest in the automobile), to tighten the noose around the neck of Bracer (Tr. 854-857). If it was procedurally unseemly (to put it mildly) for the Government to have spun the procedural web in the way it did in this trial with a view to insinuating the full text of the Bracer written statements into evidence notwithstanding the defense efforts to avert such, it was a deed of grave prosecutive unfairness in this Federal criminal prosecution to thrust home to the hilt in the Government's summation to the Jury the allegedly inculpative subject matter of those Bracer statements.

The only "chance" that Bracer was given by the Court, in its instructions to the Jury, to avoid the destructive effects of the written statements, was *via* instructions on the issue of voluntariness (27a-28a, 31a, 32a-33a). But this issue, as we have earlier urged (Pet. Cert. p. 16), should have been resolved in the first instance by the Court itself under the rule most recently elaborated in *Jackson* v. *Denno, supra.*

This is not a case where the raising of objections of constitutional-procedural aggrievement is mere "loophole-searching" by the defendant. Bracer had an excellent chance of acquittal, in view of the impressive stand taken on his behalf by the co-defendant Solero and his admirable counsel, Miss Perlmutter. The Jury did not have an easy time in deciding this case; they repeatedly returned for additional instructions, and while several of these requests by the Jury related to the problem of "entrapment"—which might be thought to refer primarily to the co-defend-

ant Torres—it is by no means clear in view of the entire tenor of the trial testimony that the Jury were worried only about "entrapment" in regard to Torres as distinct from Bracer (33a-35a, 36a, Tr. 903). The Jury also made specific requests for additional instructions concerning Bracer's part in the case (38a, Tr. 899-903). And, we especially emphasize, they wanted to know near the end of their deliberations whether they could recommend leniency as to any defendant (Tr. 899-903); there can be little doubt that, in the light of the entire trial testimony, this declared compassion by the Jury related to Bracer—the Court of course told the Jury that they were "in no way concerned with the question of punishment" (Tr. 901).

We respectfully submit that the Government in its opposition to this petition for certiorari departs from a humane constitutional perspective when it strives to defeat further review of the case of Albert Bracer on the ground that his trial counsel somehow elected to let the Jury consider written statements of the defendant which the Government does not trouble to deny were or very well may have been obtained from him by means of an extremely dubious constitutional character. In *Henry* v. *Mississippi*, — U.S. —, 13 L. Ed. 408, 415, this Court recently noted that, "where the circumstances are exceptional", trial "strategy adopted by counsel without prior consultation with an accused will not * * * preclude the accused from asserting constitutional claims * * *." While Bracer's present counsel, in this certiorari application, is not in a position to aver one way or the other whether the drug-besotted Albert Bracer and his trial counsel had any sort of meaningful *entente* on trial strategy in this case, it may

be stated that, from a reading of this entire record, the strongly likely conclusion is that, far from there having been any such consultative *entente* between client and trial counsel, the latter himself, despite all commendable earnest efforts on his part, fell short by far of that "strategic" wiliness which the Government here seeks to make the ground of the denial of certiorari to his wretched client.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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